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Rocio Flores

**UNITED STATE DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ANTONIO LOPEZ, individually;  
JOHANNA LOPEZ, individually;  
M.R., by and through his guardian ad  
litem, April Rodriguez, individually  
and as successor in interest to  
Brandon Lopez; B.L. and J.L., by and  
through their guardian ad litem  
Rachel Perez, individually and as  
successors in interest to Brandon  
Lopez; S.L., by and through his  
guardian ad litem, Rocio Flores,  
individually and as successor in  
interest to Brandon Lopez,,

Plaintiff,

vs.

Case No.: 8:22-cv-01351-JVS-ADS

*(Honorable James V. Selna; Magistrate  
Judge Autumn D. Spaeth)*

**PLAINTIFFS' NOTICE OF MOTION  
AND MOTION TO STRIKE  
PREVIOUSLY UNDISCLOSED  
EXHIBITS SUBMITTED IN  
SUPPORT OF DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT PURSUANT TO  
FEDERAL RULE OF CIVIL**

Case No. 8:22-cv-01351-JVS-ADS

**PLAINTIFFS' NOTICE OF MOTION AND MOTION TO STRIKE PREVIOUSLY UNDISCLOSED  
EXHIBITS SUBMITTED IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 37; REQUEST FOR NON-MONETARY  
SANCTIONS AGAINST ALL DEFENDANTS**

CITY OF ANAHEIM, a municipal corporation; CITY OF SANTA ANA, a municipal corporation; DAVID VALENTIN, individually and in his official capacity as the Chief of Police for the CITY OF SANTA ANA Police Department; JORGE CISNEROS, individually and in his official capacity as the Chief of Police for the CITY OF ANAHEIM Police Department; PAUL DELGADO, individually and in his official capacity as an officer for the CITY OF ANAHEIM Police Department; BRETT HEITMAN; KENNETH WEBER, individually and in his official capacity as an officer for the CITY OF ANAHEIM Police Department; BRETT HEITMAN; CAITLIN PANOV, individually and in her official capacity as an officer for the CITY OF ANAHEIM Police Department; BRETT HEITMAN, individually and in his official capacity as an officer for the CITY OF ANAHEIM Police Department; BRETT HEITMAN; DOES 1-10, individually and in their official capacity as law enforcement officers for the CITY OF ANAHEIM Police Department and CITY OF SANTA ANA Police Department,,

Defendants.

**PROCEDURE 37; REQUEST FOR NON-MONETARY SANCTIONS AGAINST ALL DEFENDANTS**

Hearing Date: August 26, 2024

Hearing Time: 1:30 p.m.

Courtroom: 10C

MSJ Hearing: August 12, 2024

FPTC: September 9, 2024

Trial: September 17, 2024

**TO THE HONORABLE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that on August 26, 2024, at 1:30 pm, or as soon as this matter may be heard, in the courtroom of the Honorable James V. Selna located at the Ronald Reagan Federal Building and United States Courthouse, 411 West Fourth Street, Santa Ana, CA, 92701-4516, Courtroom 10C, Plaintiffs ANTONIO LOPEZ and JOHANNA LOPEZ will move this Court for an order striking certain exhibits attached to the Declaration of Abigail McGlaughlin filed in support of Defendants' Motion for Summary Judgment [Dkt. 129 et seq] and for the imposition of non-monetary sanctions under Fed. R. Civ. P. Rule 37 on the grounds that:

1. The fact discovery cutoff was June 7, 2024;
2. In support of their Motion for Summary Judgment Defendants, filed, and thereby disclosed for the first time, the composite video (Exhibit 1), the interviews of Defendant officers and law enforcement witnesses (Exhibits 2 through 10, 13 through 15), and the associated transcripts of those interviews. (Exhibits 9 through 29); and
3. These exhibits were never produced during discovery despite Plaintiff issuing Request for Production of Documents that specifically requested these documents.

Plaintiff requests non-monetary sanctions against the Defendants in the form of striking the above exhibits and all information derived from these exhibits from the record and from the Court's consideration of Defendants' Motion for Summary Judgment.

This motion is made following the conference of counsel pursuant to Local Rule 7-3 that took place on July 19, 2024.

This motion is based on this Notice of Motion, attached memorandum of points and authorities, the declaration of Lena P. Andrews (hereinafter "Andrews Decl.") and attached exhibits, and any additional oral argument and evidence this Court permits.

Dated: July 26, 2024

**BURRIS, NISENBAUM, CURRY & LACY LLP**

By: /s/ Lena Andrews

DeWITT M. LACY  
 JOHN L. BURRIS  
 JULIA N. QUESADA  
 LENA P. ANDREWS  
 Attorneys for Plaintiff,  
 Ymelda Elena

## **INTRODUCTION**

This is a civil rights case arising out of an officer involved shooting that resulted in the death Brandon Lopez. The City of Anaheim, Anaheim City Attorney's Office, and its retained private counsel from Lewis Brisbois are seasoned in this type of litigation and are fully aware of their discovery obligations. Despite this, the City of Anaheim Defendants, collectively, failed to uphold their discovery obligations by producing all relevant documents, including those responsive to Plaintiffs' Request for Production of Documents, that they intended to use to support their Motion for Summary Judgement. Instead, Defendants hid the ball until the time of summary judgment where they filed and relied on several documents that were never produced to Plaintiffs during discovery. This gamesmanship, especially in a serious case of a fatal officer involved shooting, is not only contrary to the Rules of Civil Procedure but highly prejudicial to Plaintiffs.

There was no substantial justification for Defendants to fail to produce these documents during discovery and then attempt to rely on them for their Motion for Summary Judgment. This failure certainly is not harmless as it hampered not only Plaintiffs' discovery but their ability to prepare for the Motion for Summary Judgment and trial.

Accordingly, Plaintiffs respectfully request this Court strike the previously undisclosed exhibits from the record; strike any portions of Defendants Motion for Summary Judgment and supporting declarations that rely on these undisclosed exhibits; and order that these exhibits are not be considered in deciding on Defendants' Motion for Summary Judgement.

## **STATEMENT OF RELEVANT FACTS**

In October of 2022, prior to both Burris, Nisenbaum, Curry & Lacy and Lewis Brisbois entering their appearance in the litigation, Defendant City of Anaheim propounded its initial disclosure Statements. (Exhibit A to Andrews Decl.) Defendant City of Anaheim's Initial Disclosures, propounded by the Anaheim City

1 Attorney's Office, identified 22 separate interviews, including interviews of the  
2 Defendant Officers, percipient Santa Ana and Anaheim law enforcement witnesses,  
3 and civilian witnesses. *Id.* No documents were produced with the initial disclosure  
4 statement. Andrews Decl. at ¶ 3.

5 Thereafter, Burris, Nisenbaum, Curry & Lacy substituted as counsel for  
6 Plaintiffs Antonio Lopez, Johanna Lopez, and S.L on September 13, 2023, and  
7 Lewis Brisbois substituted in as counsel for the City of Anaheim Defendants on  
8 November 2, 2023. [Dkt 90-92, 100]. The Anaheim City Attorney's Office remained  
9 as counsel of record for the City. *Id.*

10 On November 17, 2023, Plaintiff Antonio Lopez propounded his Request for  
11 Production of Documents to Defendant City of Anaheim, Set One. (Exhibit B to  
12 Andrews Decl.) Request No. 5 sought "a complete copy of ALL statements and/or  
13 interviews of civilian witnesses PERTAINING TO the INCIDENT." *Id.* Request  
14 No. 7 sought "a complete copy of ALL statements and/or interviews of law  
15 enforcement personnel PERTAINING TO the INCIDENT." *Id.* Request No. 8  
16 sought "a complete copy of ALL statements and/or interviews by Defendants Paul  
17 Delgado, Brett Heitmann, Caitlin Panov, and Kenneth Weber PERTAINING TO the  
18 INCIDENT." *Id.*

19 On December 11, 2023, Defendant City propounded their responses. (Exhibit  
20 C to Andrews Decl.) Defendants responded with only objections to the above  
21 requests and did not produce any responsive documents. *Id.* Moreover, though the  
22 Defendants asserted several claims of privilege in their responses, no privilege log  
23 was produced. *Id.*

24 Thereafter on January 17, 2024, Defendant City propounded its Supplemental  
25 Disclosure Pursuant to Federal Rule of Civil Procedure 26(A)(1). (Exhibit D to  
26 Andrews Decl.) In it, Defendant City listed out each document that it had produced  
27 thus far. *Id.* The interviews appear nowhere on the list, putting Defendants further  
on notice that the interviews had not been produced. *Id.* Discovery thereafter closed

on June 7, 2024, with Defendants never having produced any of the interviews described in the City's initial disclosure statement. Andrews Decl. at ¶ 4.

On July 15, 2024, Defendants filed their Motion for Summary Judgment. [Dkt. 129 et seq]. In support of their Motion for Summary Judgment Defendants, filed the composite video (Exhibit 1), the interviews of Defendant officers and law enforcement witnesses (Exhibits 2 through 10, 13 through 15), and the associated transcripts of those interviews (Exhibits 9 through 29). This was the first time any of these documents had been disclosed to Plaintiff as they were never produced during discovery despite them being directly responsive to several of Plaintiff's Request for Production of Documents and likely to lead to the discovery of admissible evidence. (See Andrews Decl. at ¶ 5; Exhibits B and C to Andrews Decl.)

### ARGUMENT

#### A. PLAINTIFFS HAVE COMPLIED WITH THEIR OBLIGATIONS UNDER LOCAL RULE 7-

3

On July 19, 2024, the parties met and conferred telephonically regarding Plaintiff's anticipated Motion to Strike after exchanging their written positions on the motion. (Exhibit E to Andrews Decl., Andrews Decl. at ¶ 6). The parties could not come to an agreement. *Id.* This motion is being filed on July 26, 2024, seven days after the meet and confer conference took place.

Accordingly, this motion is made following the conference of counsel pursuant to Local Rule 7-3.

#### B. DEFENDANTS' USE OF THE EXHIBITS VIOLATES FED. R. CIV. P. 37 AND THE EXHIBITS SHOULD BE STRUCK FROM THE RECORD

Federal Rule of Civil Procedure § 37(c)(1) states that if a party fails to provide information or identify a witness as required by Rule 26, then that party cannot use that information or witness as evidence in a motion, hearing, or at trial, unless the failure was substantially justified or harmless. See e.g., *Algaier v. Bank of America*, N.A., 2015 WL 5944177 at \*6-7 (excluding five exhibits submitted in support of the



1 plaintiff's opposition to summary judgment because the exhibits were not produced  
2 in discovery in violation of Rule 37, and there was no substantial justification for  
3 doing so); *Chisolm v. 7-Eleven, Inc.*, 383 F.Supp.3d 1032, 1044-45 (S.D. Cal. 2019)  
4 (excluding email submitted by the plaintiff in support of opposition to motion for  
5 summary judgment since the email was not produced in discovery, and failure to  
6 produce was not justified).

7 Here, fact discovery closed on June 7, 2024. [Dkt. 126]. Defendant City and  
8 their counsel from Lewis Brisbois know that parties are obligated to disclose,  
9 without the need for any discovery requests, any relevant documents that they intend  
10 to use to support claims and defenses at trial. *See* Fed. R. Civ. P. Rule 26. Moreover,  
11 under Fed. R. Civ. P. Rule 34, Defendants are obligated to produce all relevant and  
12 non-privileged documents that are responsive to a proper Request for Production of  
13 Documents. Despite this knowledge, Defendants inexcusably and without  
14 justification failed to produce documents that they intended to rely on in their Motion  
15 for Summary Judgment and at trial to support their claims and defenses.

16 The failure to disclose is not harmless and Plaintiff is substantially prejudiced  
17 by their lack of disclosure as Plaintiff did not have an opportunity to rely on this  
18 evidence during depositions, take depositions based on the content, or to conduct  
19 investigations into the truth and veracity.

20 Instead of complying with their discovery obligations or the rules regarding  
21 the failure to disclosure, Defendants instead filed the exact interviews Plaintiffs had  
22 sought in their discovery requests, but Defendant City had failed to produce. As it  
23 was clear from the initial disclosure statement that Defendant City has had  
24 possession, custody, or control of these documents since October of 2022, the failure  
25 to produce them in a disclosure or in response to Plaintiffs pointed Request for  
26 Production of Documents is entirely unjustified and without reasonable excuse. This  
27 in and of itself is sufficient under Rule 37 to grant Plaintiffs' Motion to Strike.

1 C. THE COURT SHOULD ALSO STRIKE ALL PORTIONS OF DEFENDANTS' MOTION  
 2 FOR SUMMARY JUDGMENT THAT MAKE REFERENCE TO THE PREVIOUSLY  
 3 UNDISCLOSED EXHIBITS

4 This Court can “impose other appropriate sanctions, including any of the  
 5 orders listed in Rule 37(b)(2)(A)(i)-(vi).” Some of the sanctions allowed are to  
 6 strike pleadings in whole or part, and prohibiting the disobedient party from  
 7 introducing designated matters in evidence. *Id.*

8 As discussed *supra.*, the exhibits were never produced in discovery and thus  
 9 should be struck. It would be a windfall for Defendants to be permitted to include  
 10 in their motion or supporting declaration information that is wholly derived from  
 11 these previously undisclosed documents.

12 Accordingly, Plaintiffs respectfully request this Court strike all portions of  
 13 Defendants’ statement of facts [Dkt. 129] and Statement of Undisputed Facts [Dkt.  
 14 129-1] that discuss facts obtained solely from the offending exhibits. Specifically,  
 15 facts nos. 13 through 17, 19 through 24, 28, 30, and 34.

16 D. DEFENDANTS’ ARGUMENTS PUT FORTH DURING THE MEET AND CONFER  
 17 PROCESS ARE NOT PERSUASIVE

18 During the meet and confer process, Defendants set forth several unpersuasive  
 19 arguments. (Exhibit D to Andrews Decl.) First, Defendant City argued that the  
 20 interviews were timely disclosed because they were identified in Defendant City’s  
 21 initial disclosure statement from October 2022. Defendants argued that counsel is  
 22 not required to produce any documents with its initial disclosure statement, but just  
 23 to identify the documents, and thereafter a party must seek the documents through  
 24 discovery requests. Though it may be true that the City complied with Fed. R. Civ.  
 25 P. 26(a)(1) in describing the documents in its initial disclosures, this does not end  
 26 the inquiry as Defendants clearly failed to comply with Fed. R. Civ. P. Rules 26(e)  
 27 and Rule 34, and its obligation to produce all relevant discovery that it intended to  
 reply on in a motion or at the time of trial.



1 Second, Defendants argued, without citing to any rule or case law, that  
 2 because Plaintiff did not file a motion to compel in response to Defendant's deficient  
 3 responses that Plaintiff has waived their right Rule 37 sanctions. Again, this is not  
 4 correct. Plaintiffs' proverbial stick for failing to meet and confer regarding the lack  
 5 of production is that the documents are not produced and thus not admissible at trial.  
 6 The failure to meet and confer does not somehow transform this stick for Plaintiff  
 7 into a carrot for Defendants and allow them to use documents that were not  
 8 previously disclosed. Moreover, under Rule 26(e) a party *must* supplement or correct  
 9 any disclosure or response without the need for a motion to compel.

10 As the documents were not produced and Plaintiff did not seek an order  
 11 compelling production, the result is that no one is permitted to use the undisclosed  
 12 documents to support a motion or at trial. This outcome is fundamentally fair to all  
 13 parties and avoids undue prejudice to both sides.

14 Third, Defendants seem to argue that the interviews are not responsive to any  
 15 of Plaintiffs' discovery requests. This is simply not true. Plaintiffs Request No. 5, 7,  
 16 and 8 sought "a complete copy of ALL statements and/or interviews of" civilian  
 17 witnesses, law enforcement personnel, and the Defendant Officers "PERTAINING  
 18 TO the INCIDENT." It is difficult to conceive of discovery requests which could be  
 19 more pointed to discover the exact interviews at issue here. Thus, Defendants clearly  
 20 failed in their obligation to participate in discovery in good faith. *See Cortez v.*  
 21 *Chipotle Mexican Grill, Inc.*, No. CV 17-4787-GW(JPRX), 2018 WL 6017033, at  
 22 \*13 (C.D. Cal. May 7, 2018) (holding Rule 37(c)(1) is implicated when a party fails  
 23 to produce documents responsive to a request for production because "the  
 24 documents Plaintiff describes were required to be produced pursuant to Rule 26(e)  
 25 as the documents are responsive to Plaintiff's requests for production.")

26 Fourth, Defendants argued that their failure was justified because Defendant  
 27 City's private counsel from Lewis Brisbois claims it was allegedly unaware that the  
 documents had not been produced. However, this is not a justification but further

1 evidence of Defendant City's lack of diligence in fulfilling their discovery  
2 obligations. Inadvertence is not a substantial justification. *Sanchez v. Stryker Corp.*,  
3 No. 210CV8832ODWJCGX, 2012 WL 13006186, at \*3 (C.D. Cal. Mar. 28, 2012)  
4 (citing *Hoffman v. Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir.  
5 2008)) (holding "Rule 37(c) includes no requirement for bad faith or willfulness,  
6 inadvertence is not a substantial justification to avoid the exclusion remedy.")

7 Moreover, this excuse rings hollow when you consider the facts in the record.  
8 Though the records were identified in Defendants initial disclosures, as Defendants  
9 themselves argued during the meet and confer process, production is not required  
10 with initial disclosures unless and until there is a discovery request that seeks this  
11 document. Thus, by their own admission, it would be unreasonable to assume these  
12 documents were produced with Defendant City's initial disclosures.

13 Thereafter Defendants received timely and pointed discovery requests seeking  
14 these interviews. Defendants have an obligation to make diligent, reasonable, and  
15 timely searches for documents in response to discovery requests. Fed. R. Civ. P.  
16 26(g). Defendant City and its counsel clearly breached this duty by failing to  
17 propound documents that it intended to rely on and already had in its possession,  
18 custody, or control. Thereafter, Defendant City had another opportunity to correct  
19 its mistake when it propounded its Supplemental Disclosures on January 17, 2024.  
20 Defendant City was clearly on notice at the time of this production that the  
21 interviews had not been produced as the disclosure listed all of the documents that  
22 Defendant City had produced thus far, and the interviews were not listed.

23 Even assuming, *in arguendo*, that counsel from Lewis Brisbois was not aware  
24 that the interviews had not been produced, this inadvertence is neither reasonable,  
25 professional, or substantially justified. This is especially true as the City Attorney's  
26 Office has represented Defendant City throughout the litigation and should have  
27 been aware of its discovery obligations. Defendant City's failure evidences a lack of  
diligence during the discovery process, which is not a substantial justification.

Fifth, Defendants argued that Plaintiffs have no grounds to strike pursuant to Fed. R. Civ. P. 37 because their production of the documents was merely untimely and does not amount to a failure to produce. Defendants rely on *Van Steenwyk v. Van Steenwyk*, 2022 U.S. Dist. LEXIS 17781, at \*10-11 (C.D. Cal. July 11, 2022)<sup>1</sup> to support their contention that “Rule 37 evidentiary sanctions are implicated by non-production, not late production.” However, the *Steenwyk* case is easily distinguishable from the case at bar. In *Steenwyk*, the Defendants failed to produce meeting minutes from a meeting that the Plaintiff attended during discovery and thereafter used the minutes to support their Motion for Summary Judgment. *Id.* The parties met and conferred and Defendants stated the failure was due to inadvertence and they had planned to produce it during discovery. *Id.* The Court decided that Defendants had not met their discovery obligations, the failure was not substantially justified, and inadvertence is not a defense thus Rule 37(c) was implicated. *Id.* The Court ultimately recommended that striking the exhibit was not the appropriate sanction in that case as it would decimate Defendants’ statute of limitations claim for a one-page document regarding a meeting that Plaintiff had personal knowledge of. *Id.* The Court instead recommended that discovery be re-opened to allow Plaintiff to take deposition regarding the document, designate an expert to analyze the document, and monetary sanctions be assessed against Defendants for the expense of bringing the motion. *Id.*

This case is clearly dissimilar where the documents at issue are interviews of the Defendants and percipient law enforcement witness regarding the Incident that Plaintiffs had no way of knowing the content of. While striking the documents was not warranted in *Steenwyk*, it is certainly warranted here where Plaintiff was deprived of documents relevant to the litigation, directly responsive to Plaintiffs’

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<sup>1</sup> The case cited by Defendants during the meet and confer process is not controlling authority as the citation refers to a report and recommendation by a magistrate judge that was later edited by the District Judge.

Request for Production, and undisputably in the possession, custody, and control of Defendant City of Anaheim.

**CONCLUSION**

In conclusion, Defendants' clear gamesmanship should not be rewarded under these circumstances. Accordingly, Plaintiffs respectfully request this Court strike Exhibits 1 through 10, 13 through 15, and 19 through 29, Defendants' statement of facts and statement of undisputed facts nos. 13 through 17, 19 through 24, 28, 30, and 34, and all portions of Defendants' Motion for Summary Judgment that rely on these facts from the record and order that these interviews and facts are not to be considered in ruling on Defendants Motion for Summary Judgment.

Dated: July 26, 2024

**BURRIS, NISENBAUM, CURRY & LACY LLP**

By: /s/ Lena Andrews

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